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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

WILLIAM PORCH, Police Officer,

Petitioner,

v.

MICHAEL GARRISON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Third Circuit erred in referencing a split in the circuit courts of appeals on the issue of whether *Heck v. Humphrey* is an automatic bar to recovery in a subsequent § 1983 action where there was a prior conviction for assault "arising from the same incident?"

2. Whether the Third Circuit erred by creating a different standard of review than required by *Heck v. Humphrey*, 512 U.S. 477 (1994)?

3. Whether the Third Circuit's acceptance of Respondent's theoretical argument that was completely at odds with the summary judgment record constituted such a departure from the accepted and usual course of judicial conduct on summary judgment as to warrant review by this Court?

4. Whether the Third Circuit erred in holding, in conflict with decisions of the Fifth, Sixth, and Ninth Circuits, that the availability of self-defense was not relevant?

5. Whether the Third Circuit erred by misstating the New Jersey simple assault statute and then compounded the error by applying the misstated statute to the analysis under *Heck*?

LIST OF PARTIES

Petitioner is Defendant, William Porch. The City of North Wildwood is a Defendant. Respondent is Michael Garrison. The following Defendants were dismissed: Denise Watson, John McBride, Robert Caruso, Robert Matteucci, Paul Skill, Ted Hindes, and the North Wildwood Police Department.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reported at 2010 U.S. App. LEXIS 7887 (3d Cir. 2010), and is reprinted at Appendix A. The opinion of the District Court of New Jersey granting summary judgment to Petitioner is reported at 2007 U.S. Dist. LEXIS 17223 (D.N.J. 2007), and reprinted at Appendix B. The opinion of the District Court of New Jersey denying Respondent's Motion for Reconsideration of the District Court's March 9, 2007 order and opinion granting Summary Judgment is reported at 2008 U.S. Dist. LEXIS 30120 (D.N.J. 2008).[1] The Order of the Third Circuit denying the Petition for Rehearing and for Rehearing *En Banc* is unreported and is reprinted at Appendix C.

JURISDICTION

The Third Circuit issued its opinion on April 16, 2010 (Appendix A) and the Petition for Rehearing and Rehearing *En Banc* was denied on May 18, 2010 (Appendix C). The within Petition, filed on behalf of Petitioner William Porch, is timely filed within ninety (90) days of the entry of the Third Circuit's Order denying the Petition for Rehearing and Rehearing

[1] The order and opinion of the District Court granting summary judgment was filed on March 9, 2007. For some unknown reason, the opinion of the District Court denying Plaintiff's Motion for Reconsideration of that order states in the body of the opinion that the order and opinion granting summary judgment were dated February 16, 2007. It is the Petitioner's position that February 16, 2007 is incorrect.

En Banc pursuant to 28 U.S.C. § 2101(c) and Supreme Court Rule 13.1. This Court has jurisdiction to review the Third Circuit's decision pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions relevant to the within Petition are as follows:

1. The Fourth Amendment provides in pertinent part: "the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated, ..." U.S. Const., amend. IV.

2. Title 42, Section 1983 of the United States Code provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State . . . , subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, . . .

42 U.S.C. § 1983.

3. N.J.S.A. 2C:12-1(a), entitled "Assault," states:

> a. Simple assault. A person is guilty of assault if he:
>
> (1) Attempts to cause or purposely, knowingly or recklessly causes bodily injury to another; or
>
> (2) Negligently causes bodily injury to another with a deadly weapon; or
>
> (3) Attempts by physical menace to put another in fear of imminent serious bodily injury.

4. N.J.S.A. 2C:3-4, entitled, "Use of force in self-protection," states:

> a. Use of force justifiable for protection of the person. Subject to the provisions of this section and of section *2C:3-9*, the use of force upon or toward another person is justifiable when the actor reasonably believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion.
>
> b. Limitations on justifying necessity for use of force.

(1) The use of force is not justifiable under this section:

(a) To resist an arrest which the actor knows is being made by a peace officer in the performance of his duties, although the arrest is unlawful, unless the peace officer employs unlawful force to effect such arrest; or . . .

STATEMENT OF THE CASE

In this §1983 excessive force action, Michael Garrison (referred to as "Respondent" or "Garrison") seeks to recover monetary damages for injuries stemming from his arrest in North Wildwood, New Jersey, on March 29, 2002, for resisting arrest and aggravated assault on a police officer and obstructing the administration of law, following his act of public urination. Despite his pleas of guilt to resisting arrest and assaulting the police officer Petitioner, William Porch (referred to as "Petitioner" or "Porch") Respondent claims that his subsequent § 1983 claim for alleged excessive force is not barred pursuant to *Heck v. Humphrey*, 512 U.S. 477 (1994). It is the position of the Petitioner that Garrison's § 1983 claim is barred pursuant to *Heck* because Garrison's admitted facts on the summary judgment record, that he both attempted to cause and subsequently did in fact cause bodily injury to Porch by admittedly repeatedly kicking him while

Porch was attempting to arrest him, would necessarily imply the invalidity of the prior conviction for assault, N.J.S.A. 2C:12-1(a).

A. Factual background

On March 29, 2002, after consuming several alcoholic beverages and smoking marijuana at a friend's home in North Wildwood, New Jersey, Garrison and several of his friends took a cab to a nearby bar. App. 2a. At the bar, Garrison consumed several more alcoholic beverages and consumed a tablet of the illegal drug ecstacy. *Id.* Subsequently, Garrison and his friends visited multiple local bars and continued to consume alcoholic beverages. *Id.* Garrison admitted he was intoxicated when he arrived at the last bar, Keenan's Bar.[2] The toxicology report taken at the hospital an hour and a half later showed a blood alcohol content of .215% bac, and a positive reading for marijuana and amphetamines.[3] Garrison admitted during his criminal plea of guilt that he did not have a good memory of what took place on the night in question.[4]

At approximately 2:00 a.m., Garrison exited Keenan's Bar and began to urinate against the side of

[2] Plaintiff's Response to Defendant's Statement of Facts filed with Plaintiff's Opposition Brief to Summary Judgment, page iii, ¶22.

[3] Exhibit T of Defendant's Appendix of Exhibits filed with Defendant's Motion for Summary Judgment.

[4] Exhibit G to Defendant's Appendix of Exhibits filed with Defendant's Motion for Summary Judgment.

the building. App. 2a. Officer Porch, a police officer in plain clothes who was patrolling the area by himself, noticed Garrison urinating in public and approached him, intending to arrest him for public urination. *Id.* Garrison admitted at his deposition that he was almost finished urinating when he was grabbed on his bicep.[5] Garrison admitted that in response to being grabbed on his bicep he turned around to face Officer Porch with clenched fists, and his knuckles facing away from his body, and near his chin.[6] This is where Garrison believes the story ends. The record on summary judgment, however, contained numerous admissions by Garrison which defeat his theoretical arguments under *Heck* that his resisting arrest and attempted assault occurred before the use of allegedly excessive force by Porch.

Despite Garrison's statements to the superior court judge during his guilty plea that he did not have much memory of what occurred, his memory improved when he was deposed in his § 1983 case. Garrison admitted that he lied on his plea form and lied to the judge to avoid serving jail time.[7] He specifically admitted that he lied when he admitted to resisting arrest and assaulting Officer Porch. He admitted he remembered more than he told the judge.[8] Specifically, Garrison

[5] Plaintiff's Response to Defendant's Statement of Facts filed with Plaintiff's Opposition Brief to Summary Judgment, page iii, ¶¶30 and 33.

[6] *Id.*

[7] Plaintiff's Response to Defendant's Statement of Facts filed with Plaintiff's Opposition Brief to Summary Judgment, page viii, ¶¶66 and 68,

[8] *Id.* at ¶¶66 and 67.

admitted in the summary judgment record that Porch identified himself as a police officer[9], that he knew Porch was a police officer[10], that Porch illuminated his badge[11] and that Garrison continued to walk away.[12] Garrison admitted Porch told him he was not free to leave and to produce identification.[13] Garrison admitted that when Porch put his hand on his body that he got rigid and began to pull away in an attempt to try to spin around and come face to face with Porch. Porch used Garrison's spinning momentum to side step him and place Garrison up against the wall of Keenan's Bar.[14] Garrison admitted that he was advised he was under arrest and to stop resisting.[15] Garrison further admitted that he attempted to head-butt Porch and continued to resist Porch's efforts to affect his arrest.[16] Garrison admitted that he raised his clenched fists at Porch and that Porch used a pulling technique on Garrison's arm to pull Garrison to the ground.[17] Garrison admitted that this act was the act of force that was excessive.[18] Importantly, when Porch

[9] *Id.* at x, ¶87

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *Id.* at x, ¶91.

[14] *Id.* at xi, ¶95.

[15] *Id.*

[16] *Id.* at xi and xii, ¶¶98, 100 and 104.

[17] *Id.* at iv, ¶37.

[18] *Id.* at vi, ¶54.

was attempting to get the second handcuff on Garrison, Garrison admitted he kicked Porch several times.[19] Porch moved to Garrison's right side to attempt to place the second handcuff on him and then sat down on Garrison's knees to stop him from kicking.[20] Garrison began to complain of neck pain and Porch was able to secure Garrison's right arm and complete the handcuffing.

A small sample of the specific facts that were admitted on the summary judgment record is as follows:

> 90. Garrison then stated that "You are a cop. I know you're a cop. I'm sorry. I'm leaving. My dad's a Philly cop."
>
> **Answer to Paragraph 90. Admitted.**
>
> 93. Porch then advised Garrison that he was not free to go and the [sic that] he must produce identification.
>
> **Answer to Paragraph 93. Admitted.**
>
> 95. When Porch put his hands on Garrison's wrist Garrison's body began to get rigid. Garrison then began to pull away from Porch and began to turn toward his left in an attempt to try to spin around and come face to face with Porch. Porch

[19] *Id.* at xii,¶¶108 and 109.

[20] *Id.* at xii, ¶111.

> repeated several times, "You are under arrest. Stop resisting."
>
> **Answer to Paragraph 95. Admitted.**
>
> 104. Garrison was continuing to thrash his entire body kicking his legs and attempting to pull his arms toward his chest to avoid handcuffing.
>
> **Answer to Paragraph 104. Admitted.**
>
> 109. Porch was initially on Garrison's left side, but because Garrison kicked him several times, Porch moved over to Garrison's right side in an attempt to keep him from spinning out of his control.
>
> **Answer to Paragraph 109. Admitted.**[21]

Further, with regard to the allegedly excessive force, Garrison remembered going to the ground, but does not remember how he was forced to the ground.[22] Garrison does not remember in what position he landed, nor does he remember what part of his body hit the ground first.[23] He remembered his ear and belly being on the

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[21] Defendant's Statement of Facts filed with his Motion for Summary Judgment and Plaintiff's Response to Defendant's Statement of Facts.

[22] Plaintiff's Response to Defendant's Statement of Facts filed with Plaintiff's Opposition Brief to Summary Judgment, page iv, ¶39.

[23] *Id.* at ¶41.

sidewalk.[24] It was when he was in this position on the ground that he alleged that he heard the break in his neck.[25] Garrison "assumed" that the break in his neck occurred from Porch slamming his head on the ground, but he later admitted that the only thing he remembers is his face hitting the sidewalk, and he does not know where Porch was when that happened.[26] He further admitted that he did not know how his face was forced into the ground or what caused the fracture to his cervical spine.[27]

Following Garrison's complaints of neck pain, Porch called for medical attention, and Garrison was taken to a nearby hospital. App. 3a. In addition to Garrison suffering a cervical spine fracture, Officer Porch sustained fractures to his fourth, fifth and sixth right ribs and a laceration to his right finger.[28] Garrison was subsequently charged with aggravated assault on a police officer, resisting arrest, disorderly conduct, and public urination. App. 3a. He pled guilty to an amended charge of simple assault and to purposefully resisting arrest, and the remainder of the charges were dismissed. *Id.*

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[24] *Id.* at ¶42.

[25] *Id.*

[26] *Id.* at ¶43.

[27] *Id.* at ¶43, 44 and 49.

[28] Defendant's Statement of Facts filed with his Motion for Summary Judgment, page 23, ¶130. There was no response to that paragraph of the Statement of Facts by Plaintiff in his Response to Defendant's Statement of Facts; therefore it is deemed admitted.

B. Procedural background

On March 3, 2004, Garrison filed a Complaint in the District Court for the District of New Jersey against Defendants, which included Officer Porch and a number of other North Wildwood police officers, the North Wildwood Police Department and the City of North Wildwood. Garrison filed an Amended Complaint against the same Defendants on March 29, 2004. Therein, Garrison alleged that Porch, the City and the Police Department violated his Fifth, Eighth and Fourteenth Amendment rights and used excessive force in violation of the Constitution of the United States. He further alleged intentional infliction of emotional distress, negligent infliction of emotional distress, common law negligence, assault and battery, and civil conspiracy.

A Motion to Dismiss certain claims pursuant to Fed. R. Civ. P. 12(b)(6), resulted in two Orders from the district court. First, on May 27, 2004, without opposition from Garrison, the court dismissed Garrison's claim for violation of the Fifth and Eighth Amendment rights, the claims for punitive damages, dismissed the Police Department from the case, and dismissed the negligence claim against the City and the individual Defendants, other than Porch. On June 25, 2004, the court dismissed any tort claims asserted in Count Eight of the Complaint against the individual Defendants other than Porch, ordered that Count Eight asserted a claim for civil conspiracy under 42 U.S.C. § 1983, and dismissed Garrison's Fourteenth Amendment claim.

Porch filed an Answer and Counterclaim, and then an Amended Answer and Counterclaim. Porch asserted

counterclaims for assault and battery, intentional infliction of emotional distress, negligent infliction of emotional distress and common law negligence.

On November 16, 2006, the parties filed a Stipulation of Dismissal with Prejudice as to all claims against the City, except the claim for vicarious liability. On December 12, 2006, the parties filed a Stipulation of Dismissal with Prejudice as to all of the individual Defendants other than Porch. Following those dismissals, the only remaining claims were Garrison's claim against Porch for unreasonable seizure and the use of excessive force in violation of his Fourth Amendment rights; Garrison's claims against Porch for intentional infliction of emotional distress, negligent infliction of emotional distress, negligence and assault and battery; Garrison's claim against Porch for conspiracy; Garrison's claim against the City to the extent that the City is vicariously responsible for the negligent acts or omissions of Porch; and Porch's counterclaim against Garrison for assault and battery, intentional infliction of emotional distress, negligent infliction of emotional distress and negligence.

Porch moved for summary judgment to dismiss Garrison's claims against him and for judgment on Porch's counterclaim against Garrison. On March 9, 2007, the district court entered an Order that: a) granted Porch's Motion for Summary Judgment dismissing Garrison's constitutional and state law claims; b) denied without prejudice Porch's Motion for Summary Judgment on Porch's counterclaim for assault and battery; c) stayed Porch's counterclaim pending a forthcoming decision by the New Jersey Supreme Court;

and d) directed the Clerk of the district court to administratively terminate the action.

The dismissal of all claims against Porch meant that the City could not be held vicariously liable for any acts or omissions attributable to Porch. Therefore, all that remained in the case was Porch's counterclaim against Garrison.

Garrison filed a timely Notice of Appeal from the March 9, 2007, Order, but it was voluntarily dismissed as an interlocutory appeal under Rule 42(b) of the Federal Rules of Appellate Procedure because Porch's counterclaim had yet to be resolved. After the case was reopened Garrison filed a Motion for Reconsideration, which was denied by the district court. The district court then entered a Consent Order which provided that Porch's counterclaim be dismissed without prejudice. The Consent Order stated that Garrison's appeal of the district court's entry of summary judgment as to his excessive force claim could proceed, but that if he won the appeal and the case was remanded to the district court, Porch could then reinstate his counterclaim. After the Consent Order was entered, Garrison again filed a Notice of Appeal. The Clerk of the Third Circuit informed the parties that the Consent Order may still not be a final appealable order. Shortly thereafter, Porch consented to the dismissal of his counterclaim with prejudice, and a Stipulation of Dismissal to that effect was filed in the district court. The appeal then proceeded.

On appeal, Garrison argued that the district court erred by concluding that because Garrison pled guilty

to resisting arrest and simple assault on arresting officer Porch, Garrison's §1983 claim against Porch for use of excessive and unreasonable force was barred by *Heck v. Humphrey*, 512 U.S. 477 (1994). The Third Circuit vacated the judgment of the district court and remanded the case for further proceedings. App. 2a. Therein, the Third Circuit determined that Garrison's conviction for simple assault does not automatically preclude him from recovering on his §1983 claim. App. 10a. It also held that self-defense was not relevant based upon "the nature of Garrison's factual claims as alleged in the complaint and pleadings." *Id.* Lastly, the Third Circuit held that "a reasonable jury could find that, even considering Garrison's initial behavior which constituted simple assault, Porch used an unreasonable amount of force in arresting him, and in doing so violated his constitutional rights." App. 10a and 11a. Thus, Garrison's §1983 claim was found not to be barred by *Heck*, and the district court erred by granting Porch's motion for summary judgment on that basis. App. 11a.

A Petition for Rehearing with a suggestion for Rehearing *En Banc*, which included a request that the Third Circuit certify the question raised to this Court pursuant to Supreme Court Rule 19, was timely filed and denied. App. 40a.

REASONS FOR GRANTING THE PETITION

The Court should grant the petition for three distinct reasons. First, the Third Circuit referenced a split in the circuit courts of appeals on the issue of whether an assault conviction for the person arrested **automatically precludes** that person from recovering on his § 1983 claim against the arresting officer. This case presents an opportunity for the Court to resolve the split in the circuit courts referenced in the Third Circuit's decision in *Garrison*, and to settle, in no uncertain terms, that *Heck* is not an automatic preclusion to a subsequent § 1983 action, and that the correct standard for review is where, as here, the alleged excessive force and the assault on the police officer were inextricably intertwined in a single course of events unbroken by the subject being restrained, handcuffed, or submitting to a lawful arrest, the subsequent § 1983 action is barred by *Heck* because otherwise the 1983 action, if successful, would necessarily invalidate the prior convictions for resisting arrest and assault.

Second, this Court should grant the petition because the Third Circuit departed from the accepted and usual course of judicial proceedings on summary judgment by accepting a theoretical argument based upon Garrison's "claims as alleged in the complaint" that were completely at odds with the admissions of Garrison on the summary judgment record. App 10a.

Third, this Court should grant the petition because the Third Circuit misstated New Jersey's simple assault statute and applied the incorrect law in its acceptance

and analysis of Garrison's theoretical argument based upon claims that were inconsistent with the summary judgment record, all of which allowed the Third Circuit to erroneously conclude that there was no logical inconsistency between Garrison's assault conviction and his subsequent §1983 claim and that the theoretical availability of self-defense in the criminal suit was not relevant.

I. THE THIRD CIRCUIT'S REFERENCE TO A SPLIT AMONG THE CIRCUIT COURTS OF APPEALS LED IT TO CREATE A DIFFERENT STANDARD OF REVIEW THAN REQUIRED BY *HECK*.

In *Heck v. Humphrey*, 512 U.S. 477 (1994) the Supreme Court held as follows:

> [I]n order to recover for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a §1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus.

Id. at 486-487.

The Court further held in *Heck* that "when a state prisoner seeks damages in a § 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated. *Id.* at 487. In its analysis, this Court in *Heck* readily acknowledged that the test was not "automatic" by its reference to cases in which preclusion would not apply. *See, e.g., Heck, supra*, 512 U.S. at 487, n.7.

In *Garrison*, the Third Circuit was called upon to analyze *Heck* and whether it served as a bar to Garrison's §1983 claim. The Third Circuit stated that it had never squarely addressed the issue of whether a simple assault conviction necessarily serves as a bar to a § 1983 excessive force claim under *Heck*. App. 9a. The Third Circuit looked to other courts of appeals which considered similar cases and noted that they "generally held that the mere fact of a conviction for assault or similar conviction arising out of the same incident does not automatically preclude recovery on an excessive force claim brought under §1983. App. 9a. The Third Circuit cited *Dyer v. Lee*, 488 F.3d 876 (11th Cir. 2007); *McCann v. Neilsen*, 466 F.3d 619, 620 (7th Cir. 2006); *Thor v. Howe*, 466 F.3d 173 (1st Cir. 2006); *Ballard v. Burton*, 444 F.3d 391 (5th Cir. 2006) and *Smithart v. Towery*, 79 F.3d 951 (9th Cir. 1996). After citing these five cases as representing the "majority" view, the Third Circuit referenced a split in the circuit courts of appeals on the issue by reference to the Sixth Circuit's decision in *Cummings v. City of Akron*, 418 F.3d 676 (6th Cir. 2006)(holding that *Heck* barred plaintiff's § 1983

excessive force claim where plaintiff had been convicted of assaulting the police officer in the same incident). Believing there was a split in the circuit courts of appeals on the issue, and believing that it needed to side with either the "majority" or the Sixth Circuit, the Third Circuit went on to first decide whether a conviction for assault automatically precludes a plaintiff from recovering on a subsequent § 1983 claim. App. 9a – 10a. The Third Circuit agreed with the "majority" that *Heck* is not an automatic bar, but clarified its basis with the language "arising out of the same incident" as opposed to the "inextricably intertwined" language used by the Sixth Circuit in *Cummings*. The Third Circuit

> has, in essence, erroneously changed the standard of review established in *Heck* from "whether a judgment in favor of the plaintiff [under §1983] would necessarily imply the invalidity of his conviction or sentence" to whether the conviction automatically precludes recovery on the subsequent 1983 claim. *Heck*, *supra*, 512 U.S. at 487; App 9a – 10a. The Third Circuit erroneously reversed the order of analysis when it failed to follow the order of analysis promulgated in *Heck*, and confused the standard of review further by interpreting the Sixth Circuit's phrase of "inextricably intertwined" as being synonymous with "arising out of the same incident," and by interpreting the *Heck* phrase "necessarily implies the invalidity" as being synonymous with "automatically precludes." *Cummings, supra*, 418 F.3d at 683; App. 9a; *Heck*, 512 U.S. at 487; App. 9a, respectively.

This Court now has the opportunity to clarify the confusion arising from the Third Circuit's reference to a split in the circuit courts, and to clarify that the correct

standard for review under *Heck* lies with an analysis of the competent evidence composing the factual record to determine whether the alleged excessive force occurred at the time of the alleged offenses of resisting arrest and assault and is thus "inextricably intertwined" in a single course of events unbroken by the subject being restrained, handcuffed, or submitted to a lawful arrest, and whether a subsequent § 1983 action would "necessarily imply the invalidity" of the prior convictions for assault and resisting arrest. *Cummings*, *supra*, 418 F.3d at 683; *Heck*, 512 U.S. at 487.

II. THE THIRD CIRCUIT'S ACCEPTANCE OF GARRISON'S THEORETICAL ARGUMENT THAT WAS COMPLETELY AT ODDS WITH THE SUMMARY JUDGMENT RECORD CONSTITUTED SUCH A DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL CONDUCT ON SUMMARY JUDGMENT AS TO WARRANT REVIEW BY THIS COURT.

The Third Circuit erred when it accepted Garrison's argument that there was a version of the events which would prevent the court from barring his subsequent excessive force claim under *Heck*. App. 10a. Specifically, the Third Circuit accepted that Garrison admitted to acting in a very aggressive manner, which constituted simple assault, and that Porch allegedly responded with excessive force. App. 10a. The Third Circuit held that "[t]his is clearly a claim of excessive force in response to an assault, and the theoretical availability of a self-defense claim in other simple assault cases is of no relevance to the present case." App. 10a. As will be set

forth in more detail below, Garrison's argument was nothing more than a theoretical possibility that was completely at odds with Garrison's admissions on the summary judgment record that he continued to resist arrest and continued to assault Officer Porch even after he initially raised his clenched fists toward Porch in a menacing manner. While Petitioner concedes that Supreme Court Rule 10 states that "a petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings. . . .", here the error was not an erroneous factual finding, but rather an acceptance of an argument that was completely at odds with the summary judgment record, which is a departure from standard judicial conduct.

In the summary judgment record, Garrison admitted the action did not stop after he resisted arrest and attempted to cause bodily injury to Porch by striking him. Garrison admitted he attempted to head-butt Porch and repeatedly kicked Porch and was resisting Porch's efforts to affect his arrest, even after the initial attempt to assault Porch by raising his clenched fists. As noted previously in the Statement of the Case section of this petition, the admitted facts on the summary judgment record prove five things; (1) Garrison's admission that the act of being taken to the ground was the act of excessive force; (2) Garrison continued to resist and assault Officer Porch by kicking him after Porch took him to the ground; (3) there was a struggle on the ground immediately after Garrison initially resisted and attempted to cause bodily injury to Porch; (4) Porch was injured from Garrison's kicks; and (5) the handcuffs were able to be put on Garrison only after Garrison complained of neck pain. The Third Circuit was obligated

to accept the undisputed material facts as presented on the summary judgment record to the district court. *See, generally, Beard v. Banks*, 548 U.S. 521 (2006). The Third Circuit did not accept the undisputed material facts on the summary judgment record but rather accepted, as argued by Garrison, that the action, and thus the analysis, stopped in the first second when Garrison initially raised his clenched fists toward Porch in a menacing manner. App. 10a. Had the Third Circuit considered the undisputed facts and admissions of Garrison on the summary judgment record, the Third Circuit would have appreciated that Garrison's argument of what occurred – namely that his resisting arrest and assaulting Officer Porch stopped after he raised his clenched fists toward Porch in a menacing manner — was plainly inconsistent with the facts to which Garrison admitted on the summary judgment record.

It is the position of Petitioner that the Third Circuit so far departed from the accepted and usual course of judicial determination of summary judgment motions under Fed. R. Civ. P. 56, that this Petition for Writ of Certiorari should be granted to correct the errors of the Third Circuit.

III. THE THIRD CIRCUIT ERRED WHEN IT MISSTATED NEW JERSEY'S SIMPLE ASSAULT STATUTE, WHICH THEREAFTER LED THE COURT TO USE THE INCORRECT STATUTE IN ITS ANALYSIS UNDER *HECK*.

The Third Circuit misstated New Jersey's simple assault statute. The Third Circuit stated that "[s]ince no deadly weapon was used in the incident, we must conclude that Garrison was convicted of either attempting or threatening to cause bodily damage to Porch." App. 3a, n 1. N.J.S.A 2C:12-1(a) states that "[a] person is guilty of assault if he: (1) Attempts to cause **or purposely, knowingly or recklessly causes bodily injury** to another; or (2) Negligently causes bodily injury to another with a deadly weapon; or (3) Attempts by physical menace to put another in fear of imminent serious bodily injury." (emphasis added) The Third Circuit should have noted that by pleading guilty to assault Garrison admitted that he not only attempted to cause but also purposely, knowingly or recklessly did cause bodily injury to Porch. The Petitioner concedes that Supreme Court Rule 10 states that a misapplication of a properly stated rule of law is rarely the error for which a Petition for a Writ of Certiorari is granted. In this case, however, it was not the misapplication of the properly stated rule of law which led to the error, but a complete misstatement of the rule of law followed by an analysis of the facts of this case using the misstated and incomplete statute which led to the error.

As set forth above in the Statement of the Case, based upon the admissions of Garrison on the summary judgment record that he repeatedly kicked Porch,

knowing he was a police officer and admitted that he had been told to stop resisting, it is clear that Garrison's theoretical argument that his assault was only an attempted assault was completely at odds with the summary judgment record. For Garrison to argue, and for the Third Circuit to conclude, that Garrison only pled guilty to the initial act of resisting arrest and the initial act of attempted assault, and that the allegedly excessive force occurred after, was completely at odds with the summary judgment record and thereby permitted the Third Circuit to incorrectly find that the subsequent § 1983 action would not invalidate his prior convictions, in violation of *Heck*. In fact, based upon the admissions on the summary judgment record, the alleged excessive force was inextricably intertwined with Garrison's continuous acts of resisting arrest and both attempts to assault and actual assault on Officer Porch which were unbroken by Garrison being restrained, handcuffed or submitting to a lawful arrest, and, as such, operates to preclude the §1983 action under *Heck*.

IV. THE THIRD CIRCUIT ERRED IN HOLDING THAT THE AVAILABILITY OF SELF-DEFENSE WAS NOT RELEVANT.

The Third Circuit held that the availability of self-defense claim in other simple assault cases is of no relevance to the present case." App. 10a. That holding was based upon the Third Circuit's erroneous acceptance of Garrison's theoretical argument that his resistance and assault only occurred before the allegedly excessive force, which argument was at odds with Garrison's admissions on the summary judgment record, and ignored the fact that Garrison kicked Porch.

For the reasons set forth in the preceding Sections, the Third Circuit erred when it accepted Garrison's argument that there was only an attempted assault, which was only committed before Porch used excessive force, **not to repel the excessive force**. That was the end of the Third Circuit's analysis, but not the end of the error. As will be set forth in detail below, the Third Circuit compounded the error by believing the action stopped as argued by Garrison, then applied only those facts to the portion of the statute it concluded was relevant to those fact, and thus ignored admitted facts relevant to what happened after the initial acts of resisting arrest and attempted assault and ignored the portion of the statute which made it a crime to actually cause bodily injury, ultimately allowing the Third Circuit to determine that the availability of self-defense was not relevant.

The facts on the summary judgment record which were not reviewed by the Third Circuit and which were necessary to fully analyze whether self-defense was relevant were that (1) Garrison admitted he knew Porch was a law enforcement officer: (2) Garrison knew that Porch was effectuating his arrest; (3) Garrison had started to walk away from Porch; (4) Garrison raised his fists and attempting to head-butt Porch; (5) Garrison admitted to subsequently struggling with Porch on the ground; and (6) Garrison repeatedly kicking Porch while on the ground to further prevent his arrest. *See*, *State v. Simms*, 369 N.J.Super. 466, 470-72 (App. Div. 2004) (defining elements of the crime).

In New Jersey, "a person may resist excessive force used by the arresting officer, even if the arrest is

otherwise legal." Cannel, *New Jersey Criminal Code Annotated*, comment 10 on N.J.S.A. 2C:3-4 (2009)(*citing, State v. Mulvihill*, 57 N.J. 151, 156-57 (1970). "[I]f the officer uses excessive or unnecessary force 'the citizen may respond or counter with the use of reasonable force to protect himself. . . .'" *State v. Simms*, 369 N.J.Super. 466, 470-72 (App. Div. 2004) (*quoting, State v. Mulvihill*, 57 N.J. at 156). Thus, the defense of self-defense is only available if the officer used unlawful force to effectuate the arrest. By pleading guilty to assault, by not raising the defense of self-defense, Garrison forfeited any claim that Porch used excessive force in effecting his arrest. To the extent that Garrison now claims that Porch's use of force in effectuating his arrest, as opposed to after he was in custody, was unlawful, it is barred because a favorable outcome in the § 1983 action would be inconsistent with the admissions Garrison made on the summary judgment record and contrary to Garrison's standing conviction for assault. The fact that the guilty plea does not contain any admissions regarding the assault or resisting arrest, as noted by the Third Circuit, is immaterial. App. 3a. While Garrison had the right under the New Jersey Criminal Code to use force to defend himself, the use of that force was only justified if he "reasonably believes that such force is immediately necessary for the purpose of protecting himself against the use of **unlawful force**. . . ." N.J.S.A. 2C:3-4(a)(emphasis added); *see also Simms, supra*, 359 N.J. Super. at 472. The summary judgment record proves that Garrison continued to assault Porch even after the excessive force, i.e. the take-down is evidence that events were inextricably intertwined, and that Garrison had the opportunity to raise self-defense, but instead pled guilty to assault, thus

acknowledging that Porch did not use unlawful force during the actual arrest. The district court's analysis and finding were correct,[29] that "[t]o allow Garrison to now argue facts to the contrary would violate the principles of *Heck*." App. 26a.

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[29] "To prevail on his excessive force claim, Garrison must prove that Porch's use of force was not objectively reasonable. To do so, Garrison could try to argue that he never attempted to, or actually did, cause bodily injury to Porch. That argument, however, would contradict his conviction for assaulting Porch. Garrison could also try to argue that the force used by Porch was not reasonably necessary. This second claim would invalidate his assault conviction because it would imply that he acted in self-defense, which is a justification defense under New Jersey law.

To establish the affirmative defense of self-defense, a criminal defendant must prove that he possessed an actual, honest belief in the necessity of using force, and that the necessity to use force was reasonable. *See, State v. Rivers*, 252 N.J. Super. 142, 599 A.2d 558, 561 (App. Div. 1991). A citizen may "protect himself whenever the force applied is excessive and unnecessary." *State v. Moriarty*, 133 N.J. Super. 563, 338 A.2d 14, 19 (App. Div. 1975). In Garrison's criminal proceedings, the fact that he did not assert self-defense, and instead pled guilty to assaulting Porch, demonstrates that the force applied to him was not excessive and unnecessary. To allow Garrison to now argue facts to the contrary would violate the principles of *Heck*."

Garrison v Porch, 2007 U.S. Dist. LEXIS 17223. App. 25a – 26a.

Moreover, because bodily injury to Porch was an element of Garrison's conviction for assault, and because Garrison admitted to kicking Porch on the summary judgment record, Garrison's theoretical argument that he only attempted to, and never did, cause bodily injury to Porch, contradicts his conviction for assaulting Porch and contradicts his admissions on the summary judgment record. *See, e.g., Ballard v. Burton*, 444 F.3d 391, 399 (5th Cir. 2006) referencing, *Sappington v. Bartee*, 195 F.3d 234 (5th Cir. 1999) and *Hainze v. Richards*, 207 F.3d 795 (5th Cir. 2000).

It is the position of Petitioner that summary judgment was properly granted by the district court when it held that "the conviction and events giving rise to Garrison's excessive force claim are inextricably intertwined, and because Garrison pled guilty to assault, an offense for which self-defense is a defense, a judgment in favor of Garrison on his excessive force claim, would undermine his conviction." App. 29a – 30a. The summary judgment record in this case established that this is clearly not, as the Third Circuit held, "a claim of excessive force in response to an assault" and thus the Third Circuit erred in concluding that self-defense was not relevant. App. 10a.

V. HAD THE THIRD CIRCUIT BASED ITS DECISION ON THE ENTIRE SUMMARY JUDGMENT RECORD AND FIRST DECIDED WHETHER THE RESISTING ARREST AND ASSAULT ON PORCH WERE INEXTRICABLY INTERTWINED WITH THE USE OF FORCE IN A SINGLE COURSE OF EVENTS UNBROKEN BY GARRISON BEING RESTRAINED, HANDCUFFED OR SUBMITTING TO A LAWFUL ARREST, THEN THE THIRD CIRCUIT WOULD HAVE DECIDED THE CASE ALONG THE SAME LINES AS THE FIFTH, SIXTH AND NINTH CIRCUIT CASES WHERE THOSE CIRCUITS WERE CALLED UPON TO ANSWER WHETHER A SIMPLE ASSAULT CONVICTION NECESSARILY IMPLIES THE INVALIDITY OF THE SUBSEQUENT §1983 CLAIM UNDER FACTS SIMILAR TO *GARRISON*.

Had the Third Circuit not erroneously created a new test under *Heck*, not accepted the theoretical argument of Plaintiff that was at odds with the summary judgment record, not misstated New Jersey law and failed to include the cause of action for actual assault, not analyzed the theoretical argument under the misstated New Jersey law, it is the position of the Petitioner that the Third Circuit would have, and respectfully should have, decided *Garrison* similarly to the Sixth Circuit's decision in *Cummings v. Akron*, 418 F.3d 676 (6th Cir. 2005); the Fifth Circuit's decisions in *Hudson v. Hughes*, 98 F.3d 868 (5th Cir. 1996) (holding that *Heck* bars a civil rights claim for excessive force and false arrest where the plaintiff has been convicted of assaulting an officer

"because self-defense is a justification defense to the crime of battery of an officer, [the plaintiff's] claim that [the defendants] used excessive force while apprehending him, if proved, necessarily would imply the invalidity of his arrest and conviction for battery of an officer.") and *Sappington v. Bartee*, 195 F.3d 234 (5th Cir. 1999) (holding that *Heck* bars a civil rights claim for excessive force and false arrest where the plaintiff has been convicted of assaulting a police officer and where the conviction necessarily implied that the officer did not use excessive force) and the Ninth Circuit's decision in *Cunningham v. Gates*, 312 F.3d 1148, 1154-1156 (9th Cir. 2002)(holding that the "police response was a natural consequence of Cunningham's provocative act . . . [and that] the two are so closely related" that the "conviction for felony murder required the jury to find that he intentionally provoked the deadly police response, and that he did not act in self-defense. Any civil claim that Cunningham was not the provocateur necessarily fails as a result of the jury verdict.")

In *Cummings v. City of Akron*, 418 F.3d 676 (6th Cir. 2005), officers attempted to arrest Cummings, but he resisted from which a struggle ensued in which the officers admitted striking Cummings with their fists and batons, spraying him with pepper spray, and a third officer using a taser gun on him. Once subdued, Cummings was handcuffed and taken into custody. He pled guilty to a reduced charge of misdemeanor assault on the officer, and the other charges were dropped. *Id.* at 680. In his subsequent § 1983 suit, Cunningham alleged excessive force against the officers.

The Sixth Circuit affirmed the district court's decision barring his subsequent §1983 claim stating:

> We agree with the magistrate judge that the success on Cummings' excessive force claim would necessarily imply the invalidity of his state assault conviction. The struggle between Cummings and the officers gave rise to both Cummings' assault conviction and the excessive force claim, and the two are inextricably intertwined. Additionally, Cummings could have raised excessive force as a defense to the assault charge, but instead he chose not to contest the charge. Thus, we hold that *Heck* bars Cummings' excessive force claim from moving forward, and we affirm the district court's grant of summary judgment to defendants on this claim. *Id.* at 682-83.

In *Hudson v. Hughes*, 98 F.3d 868 (5th Cir. 1996), Hudson was convicted of possession of a firearm and battery of an officer after two separate trials. In finding that Hudson's excessive force claim was not cognizable under §1983, the court stated:

> "[i]n Louisiana, self-defense is a justification defense to the crime of battery of an officer. (citations omitted) To make out a justification defense, the criminal defendant charged with battery of an officer must show that his use of force against an officer was both reasonable and necessary to prevent a forcible offense against himself. (citations omitted) Because

> self-defense is a justification defense to the crime of battery of an officer, Hudson's claim that the three officers used excessive force while apprehending him, if proved, necessarily would imply the invalidity of his arrest and conviction for battery of an officer."

Id. at 873. The court held that "this is true because the question whether the police applied reasonable force in arresting him depends in part on the degree of his resistance, which in turn will place in issue whether his resistance (the basis of his conviction for assaulting a police officer) was justified, which, if it were, necessarily undermines that conviction." *Id.* Like *Garrison*, the alleged excessive force in *Hudson* occurred during the arrest, not after the subject was restrained. *Id.* at 871.

The Fifth Circuit was similarly called upon to analyze *Heck* in *Sappington v. Bartee*, 195 F.3d 234 (5th Cir. 1999). There Sappington was convicted of assaulting Officer Garcia. *Id.* at 235. In his subsequent lawsuit alleging excessive force, Sappington, like Garrison, argued that the officer might have used excessive force after plaintiff offered some resistance, and in such circumstances he would have a viable civil rights claim. *Id.* at 236. The court noted that his "theoretical possibility [was] . . . completely at odds with the summary judgment record" and that his claim was thus "necessarily inconsistent with his criminal conviction." *Id.* at 236 and 237. Like Garrison, Sappington admitted in discovery that he had physical contact with the officer, and accepting this version of the events, the court held that "his claim is necessarily inconsistent with his

criminal conviction" for battery. *Id.* at 236. Based upon the arguments contained in this petition, the same can be said in *Garrison.*

Despite the reference by the Third Circuit to *Smithart v. Towery*, 79 F.3d 951 (9th Cir. 1996) as being included in the "majority" of cases with which it sided in *Garrison*, the Ninth Circuit subsequently decided *Cunningham v. Gates*, 312 F.3d 1148 (9th Cir. 2002), which is in conflict with the Third Circuit's decision in *Garrison.* There Cunningham's conviction for felony murder required the jury to find that he intentionally provoked the deadly response, and that he did not act in self-defense. The Ninth Circuit stated that a civil claim that Cunningham was not the provocateur necessarily failed as a result of the jury verdict because the key factor was that Cunningham's crime was part of a single act for which the jury found that Cunningham was responsible. *Id.* at 1154. There was no break in the action between Cunningham's provocative act of firing on the police and the police response that plaintiff claimed was excessive. "Because the two were so closely interrelated, Cunningham's conviction foreclose[d] his excessive force claim against the officers." *Id.* at 1155. The same should have been found in *Garrison*, when, on the summary judgment record, Garrison admitted that following Porch's act of placing his hand on Garrison's bicep, Garrison not only attempted to cause bodily harm to Porch, he actually did cause bodily injury to Porch by his kicking him and Porch suffering a lacerated finger, thus inflicting the bodily injury required to be guilty of simple assault.

The cases above highlight what the Third Circuit was required to do in *Garrison* – namely to review the circumstances attendant to the conviction for simple assault and resisting arrest and carefully compare them to the summary judgment record. Had the Third Circuit done that, it would have found that Garrison's theoretical argument that he resisted arrest and attempted to assault Porch before Porch used allegedly excessive force was completely at odds with the summary judgment record. As it stands now, the Third Circuit's decision in *Garrison* is in conflict with the above-noted cases from other courts of appeals that have held that where the alleged excessive force and the assaults on the police officer are inextricably intertwined in a single course of events unbroken by the subject being restrained, handcuffed, or submitting to a lawful arrest, that *Heck* bars the subsequent § 1983 claim. *Garrison* would not have been in conflict with the above-noted cases if the Third Circuit had first determined, based upon the complete summary judgment record, whether a judgment in favor of Garrison on his 1983 claim would necessarily imply the invalidity of his convictions for resisting arrest and assault, as established by *Heck*, and followed by the Fifth, Sixth and Ninth Circuits.

VI. TO THE EXTENT THE THIRD CIRCUIT RELIED UPON THE "MAJORITY" CASES FOR ANY OTHER PROPOSITION THAN FOR THE GENERAL PROPOSITION THAT *HECK* IS NOT AN AUTOMATIC PRECLUSION TO A §1983 CLAIM, SAID RELIANCE WAS ERROR BECAUSE EACH OF THOSE CASES IS DISTINGUISHABLE FROM *GARRISON*.

From the Third Circuit's decision in *Garrison*, it is impossible to tell if the Third Circuit, in siding with the "majority" of courts of appeals that decided similar issues, appreciated the factual differences between those cases and *Garrison*. It is unknown why the Third Circuit believed it needed to side with any other circuit on the issue, nor why the Third Circuit engaged in the "automatic preclusion" analysis in the first instance. The *Heck* analysis is based on an analysis of the facts of each case and since the Third Circuit did not explicitly note any factual or procedural differences between *Garrison* and the cases constituting the "majority," and because the differences are significant, they will be analyzed here.

Despite the Third Circuit's reliance on the First Circuit's decision in *Thor v. Howe*, there the court did not actually decide the *Heck* issue because the record did not permit a determination of the requisite relatedness. *Thor v. Howe*, 466 F.3d 173, 180 (1st Cir. 2006). The facts are significantly different from *Garrison* however, and worth mentioning. Thor pled guilty to three counts of assault and battery with a deadly weapon. Thor offered two theories in his defense. The first was that he was not guilty of assault at all,

which is squarely *Heck* barred. *Id.* at 180. The second was that "his excessive force claim need not impugn his convictions for assault and battery with a dangerous weapon in order to establish that Officer Howe used excessive force. *Id.* "Thor [said] that even if his car had previously hit the cruisers and brushed Officer Dibara's body, by the time of the shooting, Thor was stationary in a car, boxed in with nowhere to go, and posed no threat to the officers, who had been told that he had no gun." *Id.* Unlike *Thor*, the Third Circuit had admissions from Garrison on the summary judgment record that he not only initially resisted arrest and attempted to cause Porch bodily injury to Porch by raising his clenched fists at him, but that he also continued to resist arrest and actually did cause bodily injury to Porch, all of which arose from an inextricably intertwined single course of events that was unbroken by Garrison being restrained, handcuffed, or submitting to a lawful arrest.

The Seventh Circuit's decision in *McCann v. Nielsen*, while it stands for the general proposition asserted by the Third Circuit, was procedurally very different from *Garrison* because it involved a motion to dismiss under Fed. R. Civ. P. 12(c) and not a motion for summary judgment with a complete record. *McCann v. Nielsen*, 466 F.3d 619, 620 (7th Cir. 2006). The focus in *McCann* was on whether the complaint, not a full summary judgment record, contained factual allegations that "necessarily impl[ied]" the invalidity of his convictions. *Id.* at 622. The Third Circuit may not have appreciated this difference inasmuch as it stated in *Garrison* that the issue of self-defense was not relevant "due to the nature of Garrison's factual claims as alleged in his complaint and pleadings." App. 10a. Before the

Third Circuit in *Garrison* were the Petitioner's pleadings and the summary judgment record which contained Garrison's admissions that he continued to resists and assault Officer Porch, causing him injury, even after the initial resistance and attempt at bodily injury. In *McCann*, the court did not have the benefit of a full summary judgment record; in *Garrison* the Third Circuit did, and the record was completely at odds with the arguments made by Garrison and accepted by the Third Circuit.

Next, the Third Circuit relied on *Ballard v. Burton*, 444 F.3d 391 (5th Cir. 2006) which is also factually distinguishable from *Garrison*. Ballard's conviction was for assault by physical menace, on an officer who was not a defendant in plaintiff's § 1983 claim. Moreover, count two of the indictment to which Ballard entered his guilty plea, stated that his acts were "not in necessary self-defense." *Id.* at 398. The Fifth Circuit held that *Heck* did not bar an excessive force claim as to Officer Burton because the plaintiff did not plead guilty to assaulting Officer Burton. *Id.* at 399. Here, Garrison is claiming Officer Porch used excessive force and Garrison pled guilty to assaulting Officer Porch. Thus, *Ballard* can hardly be said to have resolved the same issue as in *Garrison*.

Finally, the Third Circuit's reliance upon the Eleventh Circuits decision in *Dyer v. Lee*, 488 F.3d 876 (11th Cir. 2007) in support of its "majority" opinion is curious because there the Eleventh Circuit specifically acknowledged therein that in a case where there is the requisite "tightness of events" and where none of the excessive force occurred after the subject had been

subdued, that such a factual scenario would force the § 1983 suit and the underlying conviction to be logically contradictory, and thus barred by *Heck*. *Id.* at 885. *See also, Smith v. City of Hemet*, 394 F.3d 689, 698-99 (9th Cir. 2005) (*en banc*) ("A 1983 action is not barred by *Heck* unless the alleged excessive force occurred at the time the offense [of resisting arrest] was being committed. . . .") *Dyer* is factually distinguishable from *Garrison* because in *Dyer* there was evidence from Dyer's version of events which indicated that some of the excessive force occurred after Dyer had been subdued. *Id.* at 883. That is not the case in *Garrison*. While Garrison argued similarly to Dyer – namely that he resisted arrest and assaulted Officer Porch and then Porch used allegedly excessive force- the theoretical possibility that existed on the record in *Dyer* does not exist in Garrison's case because Garrison admitted on the summary judgment record that he initially resisted arrest and attempted to cause bodily injury to Porch and that he subsequently continued to resist arrest and in fact kicked Porch, thus admitting both elements of simple assault under N.J.S.A. 2C:12-1(a), and after all of that he was able to be subdued. In footnote 7 of its Opinion, the Eleventh Circuit noted that "[i]f the excessive force was not met by resistance by Dyer, then that excessive force could not have been used as a defense to the underlying conviction. Therefore, that force could support a § 1983 suit without negating the underlying conviction." *Id.* at 883, n.7. Stated differently, and as applicable in *Garrison*, if the alleged excessive force is met by resistance, then that excessive force could have been used as a defense to the underlying conviction, and that force could not support a §1983 suit without necessarily negating the underlying conviction.

Therefore, based upon the summary judgment record, Garrison should not be able to avail himself of the same theoretical possibility Dyer used to escape a bar to her excessive force claim under *Heck*.

CONCLUSION

For the foregoing reasons, Petitioner respectfully request that the Supreme Court grant review of this matter.

Respectfully submitted,

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